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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Proposed Legislation

Employee "Free Choice" Act H.R. 800

As reported previously, on March 1, 2007 the U.S. House of Representatives voted 241-185 to pass H.R. 800, the misnamed "Employee Free Choice Act (EFCA) of 2007." With its passage by the House, organized labor's efforts to overhaul the Nation's labor laws cleared its first legislative hurdle. The bill was then taken up in the U.S. Senate's Health, Education, Labor & Pension Committee where testimony was heard. Testimony by a former labor organizer was revealing. He said he left that line of work because he became revolted by the ugly methods that he was encouraged to use to pressure employees into union ranks. A material handler said that the only way to stop the badgering and pressure is to sign the card. He and other employees feel that the UAW is holding their

heads under water until we drown. Yet the proposed legislation would eliminate the secret election and make employees and employers alike submit to a unionized workforce by signing a card (often times under pressure). An interesting aside, in August 2001, House Democrats pleaded with Mexican officials to use secret ballot elections for determining union support. "The secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union that they might not otherwise choose." Of the 11 signers still in Congress, all voted to deny American workers secret ballots, including the sponsor of the legislation, George Miller, D-Calif.

It is widely anticipated that the Senate will "filibuster" a motion to proceed to a vote on the bill, and thus prevent it from reaching the Senate Floor for a vote. Senate rules require

60 votes to "invoke cloture" that shuts off debate and ends a filibuster, versus a simple majority of votes to pass the bill. While these procedural hurdles do not deter the unions, organized labor and democrats may seek additional votes by modifying the bill to make it more acceptable to Senators looking for a compromise to end the filibuster.

The Bush Administration stated that the President would veto the legislation. This Presidential veto statement, however, does not end the discussion because the bill may be modified and attached to unrelated, "must pass" priority legislation that is important to the President. In the short run, employers should not become complacent because of the veto promise. More significantly, the long term concern is the unions' calculation that a veto, in their words, "tees up" the issue for the 2008 elections when they hope to elect a President that will sign the bill. Soundly defeating this legislation in the Senate is the only way to ensure that proponents won't harbor the hope of later reviving it. It is not too late to let your senators know that this legislation is neither good for business nor employees.

Discrimination

Employer's Request for Medical Evaluation

A staff chemist was allegedly having psychological problems that created issues at work. He took Family & Medical Leave Act leave and returned on a reduced leave schedule. However, he continued to have problems and was asked by the employer to submit to a fitness-for-duty evaluation. The employee refused and after being given multiple opportunities, the employee was discharged. He sued alleging a violation of the FMLA and Americans with Disabilities Act. The Court of Appeals held that issues associated with possible threats to employee

safety stemming from the staff chemist's strange behavior and poor work performance were sufficient to meet the business necessity element of the ADA standard for employer requested medical examination. That is, employers may request an employee to undergo medical evaluation if they have a documented business necessity for doing so. The FMLA claim was held to be without merit. *Ward v. Merck & Co.*, No. 06-1270 (3d Cir. 3/14/07)

Employer's Liability Can be Based on Coworker's Report of Harassment

An employee told the plant manager that a coworker was being harassed by "the guys" and it had been going on for a while. The plant manager was authorized by the employer to receive sexual harassment complaints. The target of the alleged harassment did not complain. When no action was taken to eliminate the inappropriate behavior, the target of the alleged harassment filed a complaint. The Court of Appeals ruled that the employer was on notice of the alleged harassment and was required to investigate and take appropriate action to eliminate any harassment from the workplace. It did not matter how the employer learned of the harassment. The employer's failure to respond properly may result in it being liable for sexual harassment. *Bombaci v. Journal Community Publishing Group*, 100 FEP Cass 632 (7th Cir. 4/10/07)

Coworker's Comments Did Not Create a Sexually Hostile Work Environment

A female employee failed to establish that she was subjected to a sexually hostile work environment based on conduct that was not directed at her. The allegations included her manager's story about a male cat raping a female cat and his reference to a female coworker as a "fat ass" as well as his allegedly viewing pornography on his office computer. The court said that the fact that

coworkers do or say things that offend someone, however deeply, does not amount to harassment if that person is not within the target area of the offending conduct (a female, minority, etc.). Absent evidence of context, there was nothing to indicate a disregard for women's feelings based on the cat rape and fat ass remarks. *Yuknis v. First Student, Inc.*, 481 F.3d 552 (7th Cir. 3/28/07)

Harassment During Entire Employment May Be Used to Support Allegations

A female employee filed her EEOC charge within 300 days of being subjected to sexually harassing conduct. To support her hostile work environment claim, she alleged conduct that occurred more than 300 days before filing her charge. The employer argued that her complaints of earlier harassment were untimely. The court disagreed. It found that the employee had complained repeatedly to the employer about the way she had been treated, and the employer employed the "grin and bear it" advice method of resolving her complaints. As long as an employee remains within a single chain of command and the same people control how the employer addresses workplace problems, there is only one employment practice, and all events may be considered, the court said. *Isaacs v. Hill's Pet Nutrition Inc.*, 100 FEP Cases 705 (7th Cir. 5/4/07)

McDonald's Franchise to Pay \$550,000 in Sexual Harassment Settlement

Eight teenagers who worked at a McDonald's restaurant alleged they were repeatedly grabbed and touched, rubbed up against, and received sexually suggestive comments from a male manager. They alleged that the employer knew that the male manager harassed females at two restaurants but took no meaningful action for years until it eventually discharged him for touching an

employee's breast. *EEOC v. GLC Restaurants Inc.*, No. CIV 05-618 (Consent Decree approval 3/20/07)

FMLA Claim Not Barred by Technical Failure to Supply Notice

An employee informed his employer that he needed leave to care for his ill mother. His request was denied so the employee resigned from his position. When the employee filed a Family Medical Leave Act lawsuit, the court found that the employee's statements to the employer that his mother needed dialysis and he was contemplating a major move to care for her was sufficient notification that his request might fall within the FMLA. No specific language need be used to request a leave under the FMLA. Also, by misinforming the employee about his FMLA eligibility, the employer interfered with his attempt to exercise FMLA rights, the court said. *Williams v. Illinois Department of Corrections*, 12 WH Cases 2d 813 (S.D. Ill 2007)

Military Leave

Denial of Holiday Pay Was Appropriate

An employee who returned from a two-year military leave expected to be paid for the holidays that occurred during his absence. He argued that his employer violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) because it provided holiday pay to employees on leave to attend court proceedings as witnesses or jurors. USERRA entitles individuals who take military leave only to those benefits the employer affords for non-military leave similar in length and circumstances, the court said. *Tully v. Justice Department*, No. 2007-3004 (Fed. Cir. 3/21/07)